according to Chinese custom to have their marriages solemnized under Part III although it did not prevent them from having their marriages so solemnized if they desired to do so. The couple in question did not marry under Part III of the Charter as no notice was given in the prescribed form as required by section 13 in the case of persons desiring to marry under the provisions of Part III.

Chinese customary marriages have long been recognised as valid despite their polygamous character. The Women's Charter by section 4 thereof, however, imposed restraints on further marriages during the continuance of such marriages until all such existing marriages ceased to exist. Any person who found himself in that situation could no longer, if he married again, contract a valid marriage with any other person during the continuance of that marriage, under any law, custom, religion or usage. The position of Chinese bachelors after 2nd March 1961 was placed on a similar footing.

The appellant/petitioner herein was a bachelor in 1966 when he contracted or effected his marriage with the respondent according to Chinese custom.

The question before us was whether he was required to have this marriage solemnized under Part III of the Charter as it then stood in 1966.

No difficulty would have arisen had he chosen to have his marriage solemnized by the Registrar under section 22 in which case a licence under section 20 authorizing the marriage would have been a prerequisite to the solemnization of his marriage. He would have had to deliver such a licence to the Registrar.

Having chosen to marry according to Chinese custom the question arose whether he was in a position to deliver such a licence to a person who could be said to be the person solemnizing the marriage having regard to the language of sub-section (1) of section 21 which was as follows before amendment of Act No. 9 of 1967:

"No marriage shall be solemnized unless a certificate for marriage or a licence authorizing the marriage has been delivered to the person solemnizing the marriage."

It seemed to us that in the special circumstances of a Chinese customary marriage such as this one there was no person who could in fact be said to be a person solemnizing the marriage between the parties.

In the circumstances such a marriage could not be said to have been solemnized under Part III of the Charter as it then stood because subsection (1) of section 21 prohibited the solemnization of such a marriage unless a licence authorizing it had been delivered to the person solemnizing it.

We arrived at the conclusion that Chinese customary marriages belong to a special class of marriages which were not within the contemplation of the Charter as marriages which had to be solemnized under Part III thereof before its amendment in 1967.

We accordingly dismissed the appeal but made no order as to costs.

Appeal dismissed.

Solicitors: *S. C. Goho & Co.; Director of Legal Aid.*

MALAYSIAN REPORTS

T.W. WU & COMPANY (M) SENDIRIAN BHD. v. SANKO ASIA LINE LTD. AND THE PORT SWETTENHAM AUTHORITY

[O.C.J. (Abdul Hamid J.) June 27, 1974]
[Kuala Lumpur — Civil Suit No. 5 of 1971]

Contracts — Bailments — Duties and responsibilities of bailee — Bailee for reward — Loss of goods after they were loaded to wharf — Whether port authority liable — Burden of proof — Contracts (Malay States) Ordinance, 1950, ss. 104 & 105.

Port Authority — Bailees — Care and diligence — Duty — Kelang Port Authority By-Laws, 1965, by-law 91(1).

In this case the facts adduced showed that 93 cases of pharmaceutical goods had been unloaded at Port Klang and kept in the custody of the Port Swettenham Authority. Subsequently only 29 cases were collected by the plaintiffs. The plaintiffs brought an action for breach of contract and/or conversion of the remaining 64 cases.

Held: (1) the Port Swettenham Authority in this case were bailees for reward;

(2) a bailee for reward is under a liability, in the performance of his duties and responsibilities. to exercise due care and diligence of the goods entrusted into his custody as a prudent man would of his own goods according to all the circumstances of the case;

(3) where a claim is made for the return of goods in his possession and on proof of failure to deliver on demand the burden lies on the bailee to establish that the loss or disappearance was not due to his fault or misconduct or lack of care or the fault, or misconduct or lack of care of his officers or servants;

(4) in this case the Port Authorities had failed to show that they had exercised due care and diligence and therefore they were liable for breach of their duty as bailees for reward.

Cases referred to:-

(1) *Lee Heng Sendirian Bhd.* v. *Port Swettenham Authority* [1971] 2 M.L.J. 27.

(2) *B.R.S. Ltd.* v. *Arthur Crutchely* [1968] 1 Lloyds Rep. 271.

(3) *Spurling* v. *Bradshaw* [1956] 2 All E.R. 121 at p. 125.

(4) *Hunt & Winterbothan Ltd.* v. *B.R.S. (Parcels) Ltd.* [1962] 1 Q.B. 617, 634.

(5) *Brooke Wharf and Bull Wharf Ltd.* v. *Goodman Brothers* [1937] 1 K.B. 534.

(6) *Dwarka Nath* v. *R.S.N. Co. Ltd.* A.I.R. 1917 P.C. 173.

(7) *Trustees of Harbour Madons* v. *Best & Co.* (1899) I.L.R. 22 Mad. 524.

(8) *Mansfield Importers & Distributors Ltd.* v. *Casco Terminals Ltd.* [1971] 2 Lloyds Rep. 72.

(9) *Malayan Thread Co. Sdn. Bhd.* v. *Oyama Shipping Line Ltd. & Anor.* [1973] 1 M.L.J. 121.

(10) *William* v. *Curson Syndicate Ltd.* (1919) 35 T.L.R. 478.

(11) *Cheshire* v. *Bailey* [1905] 1 K.B. 237.

(12) *Morris* v. *Martin* [1966] 1 Q.B. 716.

CIVIL SUIT.

C. W. M. Abraham for the plaintiffs.

N. A. Marjoribanks (*Lall Singh Mukher* with him) for the first defendant.

J. Puthucheary (*Wong Chong Wah* with him) for the second defendant.

Abdul Hamid J.: The plaintiff T.W. Wu & Company (M) Sendirian Berhad brought an action against the carriers Sanko Asia Line Limited and the Port

Swettenham Authority (hereinafter referred to as "the Port Authorities") for breach of contract and/or for conversion.

In March 1970 93 cases of pharmaceutical goods were shipped aboard the vessel "Sansei Maru" at Hongkong for carriage and delivery at Port Kelang to the plaintiffs. The vessel arrived at Port Kelang on or about April 5, 1970 and the ship's tally showed that all 93 cases were unloaded at the wharf on the same day between 3.40 and 4.35 p.m. The plaintiffs through Din Trading Sendirian Berhad their forwarding agents subsequently collected 29 cases.

On April 15th the plaintiffs wrote to the Traffic Manager stating that they only received 29 cases and 64 cases could not be found or traced. They asked the Port Authorities to investigate. The Port Authorities sent a reply in April saying that according to the outturn 64 cases shortlanded. Din Trading also wrote to the Traffic Manager of the Port Authorities (P6A and B) informing him that these 64 cases could not be found in spite of the search made.

On April 16th the ship's agents wrote to Din Trading maintaining that 93 cases were discharged complete vide tally sheet No. 1 (P1) a copy of which was sent to the Traffic Manager of the Port Authorities.

Din Trading obtained the delivery order from the ship's agents on receipt of the Bills of Lading. Ng Boon Bee the chief forwarding clerk of Din Trading made a Customs Declaration. According to him the Customs examined the goods at Shed No. 8. The paper was passed and duty was paid. All the 93 cases were there when he and a Customs Officer inspected them.

Sallehuddin bin Hamzah (PW4) the forwarding agents' transport supervisor confirmed that Customs examination was done on April 8th. It took six hours and duty was paid on April 9th.

Before I proceed to deal with the facts it may be necessary to determine the relationship between the plaintiffs and the Port Authorities. In the light of the long line of decided authorities it seems clear that the relationship was that of bailor and bailee. And on the evidence before the court it is quite apparent that the Port Authorities were bailees for reward [see *Lee Heng Sendirian Berhad* v. *Port Swettenham Authority*[1] (Federal Court)].

Our law as to duties and responsibilities of a bailee in all cases of bailment are set out under sections 104 and 105 of the Contracts (Malay States) Ordinance, 1950 which read as follows —

"104. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods bailed.

"105. The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of care of it described in section 104 of this Ordinance."

At common law it would seem that —

"A custodian for reward is bound to use due care and diligence in keeping and preserving the article entrusted to him on behalf of the bailor. The standard of care and diligence imposed on him is higher than that required of a gratuitous depository, and must be that care and diligence which a careful and vigilant man would exercise in the custody of his own chattel of a similar description and character in similar circumstances." [*Halsbury's* Laws of England 3rd ed. vol 2 page 214 paragraph 225].

As to onus of proof it seems clear that —

"When a chattel entrusted to a custodian is lost, injured, or destroyed, the onus of proof is on the custodian to show that the injury did not happen in consequence of his neglect to use such care and diligence as a prudent or careful man would exercise in relation to his own property. If he succeeds in showing this, he is not bound to show how or when the loss or damage occurred. If a custodian declines either to produce the chattel entrusted to him, when required to do so by the owner, or to explain how it has disappeared, the refusal amounts *prima facie* to evidence of breach of duty on his part, and throws on him the onus of showing that he exercised due care in the custody of the chattel and in the selection of the servants employed by him in the warehousing." [*Halsbury's* Laws of England 3rd ed. vol. 2 page 117 paragraph 227].

In *B.R.S. Ltd.* v. *Arthur Crutchely*[2] Lord Justice Sachs at page 286 in a case of bailment said —

"... the onus of proof, of course, lay on the defendants to prove that at the time of the theft they were taking proper care of the load having regard to all the circumstances, or if they failed so to prove, then to show that their lack of care was not the cause of the theft. In the present case the first and most important issue to be determined is whether the defendants proved that their system of looking after the goods was one which was proper in all the circumstances.

The common law has always been vigilant in the interests of bailors whose goods are not returned to them by the bailee for a number of reasons: in so far as that vigilance relates to the onus of proof, one of the reasons stems from the fact that normally it is only the bailee who knows what care was being taken of the goods, ..."

As far as I can gather the law as to onus of proof in regard to a bailee for reward in this country is similar to that at common law. Ong C.J. dealing with by-law 91(1) of the Kelang Port Authority By-Laws 1965 in *Lee Heng's* case, *supra*, considered whether in its true construction the operation of common law principles is by that rule excluded so as to shift the burden of proving how the goods came to be lost from the bailee to the bailor. At page 29 his Lordship had this to say —

"Having thus averred negligence against the respondent, they succeeded in proving the loss of one case while it was in the respondent's custody. In the case of non-delivery all that the bailor need plead is the contract and a failure to deliver on demand. That puts on the bailee the burden of proving either loss without his fault (which would be a complete answer at common law) or, if the loss was due to his fault, that it was a fault from which he is excluded by the exemption clause: see Denning L.J. in *Spurling* v. *Bradshaw*.[3] Mere non-delivery, therefore, is *prima facie* evidence of negligence — this being a case of *res ipsa loquitur*. And 'once negligence on the part of the defendants had been established and this negligence could have caused the loss, it was eminently reasonable to ask them to prove that in fact it did not'; see *Hunt & Winterbotham Ltd.* v. *B.R.S. (Parcels) Ltd.*[4] *per* Donovan L.J. who went on to say —

'Similarly, in *Brooke Wharf and Bull Wharf Ltd.* v. *Goodman Bros.*[5] (another case of a claim in negligence) it was held that the circumstances of the loss of goods by a bailee may justify the inference of negligence as the cause of the loss, which inference it would be for the bailee to displace'."

It is perhaps appropriate at this juncture to refer to the case of *Dwarka Nath* v. *R.S.N. Co. Ltd.*[6] where Sir Walter Phillimore at page 175 after referring to sections 151 and 152 of the Indian Contract Act which

are identical with sections 104 and 105 of our Contracts (Malay States) Ordinance, 1950 said —

"The weight to be attached to judgment of the learned judge of first instance, who saw the witnesses, is a good deal lessened by reason of his having apparently thrown the burden of proof on the wrong party. He states that it was, in his opinion, incumbent upon the defendant company to satisfy him that they had taken such care of these goods as a man of ordinary prudence would take of his own goods. This, in their Lordships' view, is not a correct statement of the law.

It is true that under the Evidence Act of 1872 section 106, 'when any fact is especially within the knowledge of any person, the burden of proving that fact is on him'; and it was therefore right that the defendant company should call the material witnesses who were on the spot, as it seems to have done. But this provision of the law of evidence does not discharge the plaintiffs from proving the want of due diligence, or (expressing it otherwise) the negligence, of the servants of the defendant company.

It may be for the company to lay the materials before the court; but it remains for the plaintiffs to satisfy the court that the true inference from the materials is that the servants of the defendant company have not shown due care, skill and nerve."

Speaking of *Lee Heng's* case, *supra*, Mr. Puthucheary submitted that the attention of the Federal Court was not drawn to the decision of the Privy Council in *Dwarka Nath's* case, *supra*. He further submitted that even in England the onus to show that goods have been lost without default or negligence on the part of the bailee is limited to actions of detinue and not to actions for breach of contract and that in Malaysia more particularly so the onus is not on the bailee to show that there is no negligence on his part. It is the defendants' contention that the onus of proof of negligence is governed by the decision in *Dwarka Nath's* case to the effect that the bailee tells the court what he had done to take care of the goods and then it is for the plaintiffs to show in the bailee's action there was some omission or commission which constitutes negligence.

With all due respect I am of the view that *Dwarka Nath's* case has not introduced any new principle of law on the burden of proof in bailment cases. The law in regard to the onus of proof in such cases is clearly stated by the learned author in Indian Contract and Specific Relief by *Pollock and Mulla* 9th ed. page 665 —

"In cases governed by the provisions of sections 151 and 152, the loss or damage of goods entrusted to a bailee is *prima facie* evidence of negligence, and the burden of proof, therefore. to disprove negligence lies on the bailee."

Reference was made to *Dwarka Nath's* case and in so doing the learned author at page 666 had this to say —

"There is a special class of cases where goods are destroyed by fire arising from some unknown cause, while they are in the possession of a common carrier or a railway company."

That burden of proof lies on the bailee to prove absence of negligence is further stated by the learned author at page 667 —

"... where goods delivered for safe custody for reward are lost while in the possession of the bailee, the burden lies on the bailee to prove absence of negligence on his part. [See *Trustees of Harbour Madras* v. *Best & Co.*[7]]."

As for the decision in *Lee Heng's* case the Federal Court's attention was in fact drawn to *Dwarka Nath's* case although no reference was made by Ong C.J. in his judgment.

Mr. Abraham counsel for the plaintiffs contended that in the present case the Port Authorities were unable to offer explanation how the goods were lost and therefore failed to discharge the burden of proof. He further contended that the security and administration and other arrangements were exclusively within the knowledge of the Port Authorities and it is incumbent upon them to lay before the court the necessary evidence in rebuttal. Reference is made to *Sarkar* on Evidence 12th ed. where the learned author at page 882 dealt with the burden of proof in cases of bailment. After referring to section 106 of the Evidence Ordinance counsel drew court's attention to a passage at page 922 where it is stated —

"The general rule is that the person who alleges negligence must prove it. In an action against a bailee for loss of property bailed to him if loss of property is *prima facie* evidence of negligence then the burden of proving that loss was not due to negligence lies upon the bailee under section 106. But where no *prima facie* inference of negligence can be drawn, section 106 however casts a duty on the bailee to give a reasonable explanation how the accident occurred [*Ponnappa* v. *Thenadhi*, A1937 M 411]. In a suit against a bailee for not taking care and saving goods from loss, e.g. fire, the bailee should under section 106 call all the material witnesses who were present at the time of the loss but that section does not discharge the plaintiff from proving want of diligence or negligence on the part of the bailee. The company is to lay all materials before the court, but the plaintiff is to satisfy that the true inference from those materials is one of due care, skill and nerve [*Dwarka Nath* v. *River S.N. Co.*, A1917 PC 173: 27 CLJ 615; see *National S. Stores* v. *G-G in Council*, A1948 S 26]. The burden of proving that the bailee has exercised ordinary care must generally be upon the bailee, the reason being that he has special knowledge of the facts. [*Secy. of S.* v. *Afzal*, 56 I.C. 714: 20 OC 96]."

I shall now refer to the case of *Mansfield Importers & Distributors Ltd.* v. *Casco Terminals Ltd.*[8]. In this case the plaintiffs were the owners of 17 cartons of automobil stereo sets which were discharged from a vessel at Vancouver and placed in the defendant warehouseman's storage shed. The defendants operated the shed under an arrangement with the National Harbours Board. The practice was that when a vessel docked, the charge for ocean freight was payable by the defendant to the carrier, and that for wharfage to the Board. The charge for handling was retained by the defendant. The Board supplied a patrol of the perimeter of the shed during non-working hours and their services were paid for by the defendants. During working hours supervisors inside the shed supervised the handling of cargo, and every stevedore was within visual range of a supervisor. When the plaintiffs sent a representative to collect the sets, it was discovered that all of them were missing. The plaintiffs claimed damages from the defendants on the ground that they were liable as bailees for reward. The defendants, however, denied liability and contended that the bailment was a gratuitous one, for the "handling" charge which was paid to them was just that, and not one for storage. It was held by Rae J. in the Supreme Court of British Columbia that —

(1) the defendants were bailees for reward;

(2) the burden of proving that they had not been negligent in the storage of the goods lay on them;

(3) the defendants should have provided more internal security than they did;

(4) the only reasonable inference was that the goods had been stolen or wrongly converted;

(5) such theft or conversion could not have occurred except for neglect of duty or complicity in the theft on the part of the defendants' employees in the course of their employment; and

(6) accordingly the defendants were liable for breach of their duties as bailees for reward or were vicariously liable for their employees being involved in the theft of the goods.

At page 77 His Lordship said —

"Indeed, on the balance of probabilities on the evidence before me, including the evidence of the officers on perimeter patrol, and the evidence that there was no indication of any break-in at any relevant time, the only reasonable conclusion is, first, that the stereos in question went missing during working hours. Second, on all the evidence before here, including the evidence as to the method of handling goods by the defendant, the arrangements for checking in and out and for checking on delivery of goods, the nature of the goods here and their weight and bulk, the only reasonable inference is that they were stolen or wrongfully converted.

"Finally, one must in reason infer that such theft or wrongful conversion could not have occurred except for neglect of duty or complicity in the theft on the part of some one or more of the defendant's employees in the course of employment."

In his submission Mr. Abraham referred to the case of *Malayan Thread Co. Sdn. Bhd.* v. *Oyama Shipping Line Ltd. and Anor.*[9] a decision of Raja Azlan Shah J. (as he then was) another case of bailment. His Lordship in dealing with the onus of proof of a bailee in the light of by-law 91(1) of the Kelang Port Authority By-Laws 1965 applied *Lee Heng's* case. His Lordship said that in the light of the rule the onus on the part of the Port Authorities is to show some circumstance which negatives the idea of misconduct or negligence on their part. Mr. Abraham, however, drew the court's attention in particular to that part of the judgment where his Lordship at page 123 said —

"They are not supposed to do the impossible. If the goods are stolen by their servants in the absence of negligence on their part, they cannot be held liable. In the absence of personal negligence on the part of the employer e.g. negligence in selecting the servant whose act had occasioned the loss, (see *William* v. *Curson Syndicate Ltd.*[10]) the latter is not responsible for the fraudulent act of the servant, as the loss of the goods is not referable to the employer's negligence, and as the loss is caused by an act which is not within the scope of the servants' employment (see *Cheshire* v. *Bailey*[11])."

Although the facts of this case may be distinguished from the facts in the *Malayan Thread* case, *supra*, I quite agree that in that case his Lordship had not considered *Morris* v. *Martin*[12] where *Cheshire* v. *Bailey, supra*, was disapproved. The facts in *Morris* v. *Martin, supra*, are as follows —

"The plaintiff sent a mink stole to a furrier to be cleaned. With the plaintiff's consent, the furrier, who did no cleaning himself, delivered the fur to the defendants, who were well-known cleaners, to be cleaned by them for reward. The contract between the furrier and the defendants which was made by the furrier as principal and not as agent for the plaintiff contained printed conditions of trading with exemption from liability clauses. Whilst the fur was with the defendants, it was stolen by one of their servants whose duty it was to clean the fur. The fur was never recovered.

The plaintiff claimed damages against the defendants for breach of their duty to return the fur to her and to exercise reasonable care in its custody and, alternatively for wrongfully depriving her of the fur. The county court judge found that the defendants had taken proper steps to safeguard the fur and were not negligent in employing the servant; and he held that the defendants were not liable because the act of the servant in stealing the fur was not done 'in the scope of his employment'."

On appeal by the plaintiff it was held allowing the appeal that the defendants being sub-bailees for reward owed to the plaintiff the owner of the fur the duties of a bailee for reward to take reasonable care of the fur.

Lord Denning M.R. at page 728A-B said —

"When a principal has in his charge the goods or belonging of another in such circumstances that he is under a duty to take all reasonable precautions to protect them from theft or depredation, then, if he entrusts that duty to a servant or agent, he is answerable for the manner in which that servant or agent carries out his duty. If the servant or agent is careless so that they are stolen by a stranger, the master is liable. So also, if the servant or agent himself steals them or makes away with them."

On page 728 Lord Denning M.R. said —

"It follows that I do not think that *Cheshire* v. *Bailey* [1905] 1 K.B. 237 can be supported."

Lord Diplock speaking of *Cheshire* v. *Bailey* at page 736 said —

"As recently as 1955 the Privy Council in *United Africa Co. Ltd.* v. *Saka Owoade*, although they reached a decision in conflict with *Cheshire* v. *Bailey*, declined to express a view as to whether it had been overruled by *Lloyd* v. *Grace, Smith & Co.* or could be distinguished from it. In the present case, we, I think, are compelled to make up our minds about this. For my part I find it impossible to reconcile the decision in *Cheshire* v. *Bailey* with the principles laid down in *Lloyd* v. *Grace, Smith & Co.* I think that decision is no longer good law and is not binding upon us."

In this regard may I refer to paragraph 226 of *Halsbury's* Laws of England 3rd Edn. vol. 2 page 117 which reads —

"The custodian is further responsible to the owner of the chattel entrusted to him both for the negligence of his agents or servants, and for their acts of fraud or other wrongful acts, provided that such acts were committed by them within the apparent scope of their authority, either in the supposed interest of their principal or master or in the course of their employment."

In the final analysis it is apparent that a bailee for reward is under a liability, in the performance of his duties and responsibilites, to exercise due care and diligence of the goods entrusted into his custody as a prudent man would of his own goods according to all circumstances of the case.

Where a claim is made for the return of the goods in his possession and on proof of failure to deliver on demand the burden shifts and the onus thereby lies upon him to establish that the loss or disappearance was not due to his fault or misconduct or lack of care or the fault or misconduct or lack of care of his officers or servants.

In the light of *Lee Heng's* case it would seem that by-law 91(1) of the Kelang Port Authority By-Laws 1965 does not relieve the Port Authority of the burden of proof that ordinarily lies upon a bailee in such circumstances.

I shall now examine the facts. The court shall in the first place determine whether all the 93 cases were unloaded at the wharf and if they were, whether they passed to the custody of the Port Authorities. On the facts before me I am of the view that the plaintiffs have adduced sufficient evidence to satisfy me that all the consignment had landed and passed into the custody of the Port Authorities. Apart from the tally sheet that showed that 93 cases were unloaded on the wharf on or about April 5, 1970 there was the evidence of Ng Boon Bee who stated that he and a Customs Officer on inspection of the cargo counted the 93 cases at Shed No. 8. Inward Cargo Charges and Customs Duty were paid on all 93 cases. Ng Boon Bee's testimony revealed that the Customs would, if any part of the consignment was missing, endorse in the Declaration Form and the forwarding agents would in that event prepare Customs Declaration Form No. 3 the number of packages found and duty would then be paid on them.

In disputing liability on the ground that the consignment shortlanded by 64 cases the Port Authorities were relying mainly on the outturn which they prepared. On the evidence adduced by the plaintiffs I am unable to accept the outturn as sufficient proof of shortlanding. The outturn merely provided evidence of stocks in their possession on the date of the stocktaking. In practice the stocktaking was only done a fortnight after the vessel had sailed. It would therefore be reasonable to assume that a number of things could have happened particularly when the consignment had to be moved from the transit shed to the import warehouse three days after landing. Encik Hamidon testified that a tally is done when the cargo is sent to the warehouse and apparently upon such tally the outturn is produced. Encik Hamidon referred mainly to the system of stocktaking generally applied by the Port Authorities. Although he stated that the tally is done when the cargo is sent to the warehouse it is not known whether this is done before the cargo leaves the shed or on arrival at the warehouse. In regard to this particular consignment no one from either Shed No. 8 or the warehouse was called to testify concerning the stocktaking. Encik Hamidon evidently was not in a position to throw any light whatever upon the subject-matter of this case. He confessed that he could not even remember what happened when the ship came into port. He also conceded that he had no personal knowledge whatever of the consignment. Although he maintained that his assistant, the Commercial Traffic Officer, had more knowledge of it no effort was made to call this officer to testify. The chief clerk at Shed No. 8 who apparently was in a position to give some evidence in regard to the consignment was also not called to testify. Explaining the finding of part of the consignment at the Kuala Lumpur Pharmacy Encik Hamidon said that this was no evidence that there was no shortlanding. In his view the cargo could have been discharged at high seas or overside the vessel while it was in port. I am inclined to regard this suggestion as a mere conjecture devoid of any merit. In the circumstances it would seem that 64 cases were missing or lost while in the custody of the Port Authorities. There remains for consideration whether the Port Authorities have succeeded in showing that the loss has not been caused by their misconduct or negligence or the misconduct of its officers or servants.

It is relevant at this point to refer to by-law 91(1) of the Kelang Port Authority By-Laws 1965 which states that —

> "The Authority shall not be liable for any loss, destruction or deterioration arising from delay in delivery or detention or misdelivery of goods or from any other cause, unless such loss or destruction has been caused solely by the misconduct or negligence of the Authority or its officers or servants."

H. T. Ong C.J. in the Federal Court case of *Lee Heng, supra*, dealing with by-law 91(1) at page 30 said —

> "Much of the argument of this appeal, however, has been devoted to the question whether rule 91(1) has the effect of shifting the onus from the bailee to the bailor of proving how the loss came about.... In the absence of clear and unequivocal language to the contrary, I am of opinion that the onus still lies on the authority to show that it has taken all reasonable care of the goods and that the loss thereof occurred in circumstances which showed no lack of care on its part."

Now, in the present case a great deal turns on whether, having regard to all the material evidence and the surrounding circumstances, the true inference is that the Port Authorities had taken all reasonable care of the goods and that the loss thereof occurred in circumstances which showed no lack of care on their part. In consideration of the facts before me, on those they sought to rely, the Port Authorities evidently failed to offer an explanation of how the goods were lost.

In the light of the circumstances surrounding the disappearance, the nature of the goods, the bulk and the arrangement relating to administration and security, I am compelled to conclude that by this failure the Port Authorities had failed to show that they had exercised due care and diligence. It may be material to add that the arrangement pertaining to the administration and security was exclusively within the knowledge of the Port Authorities and it is incumbent upon them to lay before the court the necessary evidence sufficient on the balance of probabilities for this court to hold that it had taken all reasonable care of the goods and that the loss had not occurred in circumstances which showed lack of care on their part.

On the facts before me the irresistable inference that arises was that the goods might have been stolen as a consequence of the negligence of the servants of the Port Authorities in the course of their employment. I am even inclined to think that the theft might indeed have taken place through active participation or complicity of one or more of their employees. [See *Mansfield Importers & Distributors Ltd., supra*].

Although goods leaving the port area are supported by proper documents delivery of the goods at the shed and the checking at the gate is all done by port employees. It may be pertinent to observe that in view of the nature of the goods, their weight and bulk, it is reasonable to conclude that they could only be taken out of the port area in a vehicle. As the goods had to be loaded at some point within the port area it would seem to me that this could not easily have been done without active assistance of the port employees.

In regard to the security arrangement Mr. Yap Sen Fook a police officer (DW2) expresed the view that policing at the port area was adequate. Nevertheless it seems clear that further measures could be taken to tighten up the security in particular the checking of goods leaving the port area, supervision of personnel having the charge of checking and delivery arrangement.

Mr. Puthucheary, in his submission touching upon the evidence adduced by the plaintiffs to the effect that 93 cases were discharged by the ship and that Mr. Ng Boon Bee and a revenue officer counted 93 cases in Shed No. 8, said that the Port Authorities have not sought to contradict this evidence because they had no means of knowing and therefore do not know whether the cases alleged to be missing were in fact under the custody of the Port Authorities.

In the present case I am satisfied that in the light of all the surrounding circumstances, the Port Authorities are liable for breach of their duty as bailees for reward. The plaintiffs' claim must therefore succeed.

I allow the plaintiffs' claim in the sum of $21,236.84 being value of the 64 cases undelivered and interest at 3% per annum with effect from April 3, 1970 and costs. Costs of the first defendant shall be paid by the second defendant.

Claim allowed.

Solicitors: *Shearn, Delamore & Co.; Lovelace & Hastings; Skrine & Co.*

WONG KIM FATT v. LEONG & CO. SDN. BHD. & ANOR.

[O.C.J. (Abdul Razak J.) June 29, 1974]
[Kuala Lumpur — Civil Suit No. 652 of 1974]

Companies — Action for declaration that defendants not entitled to enforce provisions of an article in Articles of Association to transfer plaintiff's shares to second defendant — Application for injunction to restrain defendants until trial of the action from enforcing the provisions — Whether substantial questions to be investigated — Whether company in substance a partnership — Whether plaintiff would suffer irreparable damage if remedy not granted.

The parties were originally partners carrying on business until they decided to form themselves into a company. The company was a private unlimited company having a share capital. The plantiff held $50,000 of the shares and the second defendant $250,000. They were the only shareholders and directors. The company had served a notice asking the plaintiff to transfer all his shares to the defendant under the provisions of article 21(d) of the Articles of Association. The plaintiff did not comply with the notice but instead brought an action (a) for a declaration that the defendants were not entitled or empowered in law or in equity to enforce the provisions of Article 21(d) of the Articles of Association to transfer the plaintiff's shares to the second defendant (b) for a declaration that the said company was in effect a partnership and the defendants were not entitled in law or equity to make the said requisition. He subsequently applied by motion for an injunction to restrain the defendants until trial of the action from enforcing the provisions of the article.

Held: the interim injunction would be granted as it is only doing substantial justice to the case and for the purpose of safely preserving the subject-matter of the action until the rights of the parties are finally determined that the defendants be restrained from exercising their rights under article 21(d) of the Articles of Association.

Cases referred to:-

(1) *Sparrow* v. *The Oxford, Worcester and Wolverhampton Railway Company* 68 E.R. 580 at p. 582.
(2) *Jones* v. *Pacaya Rubber and Produce Company Ltd.* [1911] 1 K.B. 455.
(3) *Republic of Peru* v. *Dreyfons Brothers & Co.* (1988) 38 Ch. D. 348 at p. 362.
(4) *The Eastern Trust Company* v. *McKenzie, Mann & Co. Ltd.* [1915] A.C. 750 at p. 760.
(5) *Ebrahimi* v. *Westbourne Galleries Ltd. & Ors.* [1972] 2 All E.R. 492.
(6) *Blisset* v. *Daniel* 68 E.R. 1022.

CIVIL SUIT.

Lim Ewe Hock for the plaintiff.

Peter Mooney for the second defendant.

Abdul Razak J.: This is a motion for an injunction to restrain the defendants until the trial of the Action No. 604/74 from enforcing the provisions of article 21(d) of the Articles of Association of the plaintiff's and the defendant's company, which reads as follows: —

"21(d) The holders for the time being of seven-tenth of the issued capital of the company may at any time serve the company with a requisition to enforce the transfer of any particular shares not held by the requisitionists. The company shall forthwith give to each registered holder of such shares notice in writing of the requisition (with a copy of this clause and of article 21(e) sub-joined) and unless within fourteen (14) days such holder shall have entered into an agreement in writing with the requisitioning members for the sale to them of his shares, he shall at the expiration of the said period be deemed to have sold and the requisitioning members shall be deemed to have purchased his said shares at a price or value to be determined in accordance with these articles."

Sub-section (e) stipulates the manner in which the price or value of the shares shall be determined, which provides in effect that the value shall be calculated by dividing the average yearly profit of the last three years (after the necessary deductions therein stated) by the amount of the issued capital existing at the end of the last of the three years before the sale or transfer.

One will at once notice that the said Article gives a member affected no reason for the take-over nor the opportunity to be heard. As far as the company is concerned, it is not obliged to do so. The directors could behind the back of the others by this method expel a member for any reason.

In the civil action, the plaintiff has asked the court for a declaration that the defendants are not entitled or empowered in law or equity to enforce the provisions of article 21(d) to transfer the plaintiff's shares to the second defendant. Further he asks for a declaration that the said company is in effect a partnership and the defendants are not entitled in law or equity to make the said requisition. He states the said requisition is null and void and asks for an injunction to restrain the enforcement.

The parties were originally partners carrying on business as such until they decided to form themselves into a company. They had been in business for more than five years until one day when the company served a notice under article 21(d) to compel the applicant/plaintiff to transfer all his shares to the defendant. No